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Mark Scheme (Results)

June 2022

Pearson BTEC Nationals in Applied Law

Unit 1: Dispute Solving in Civil Law (20168K)

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Unit 1: Dispute Solving in Civil Law (20168K)

General marking guidance

- All learners must receive the same treatment. Examiners must mark the first learner in exactly the same way as they mark the last.
- Mark grids should be applied positively. Learners must be rewarded for what they have shown they can do rather than be penalised for omissions.
- Examiners should mark according to the mark grid, not according to their perception of where the grade boundaries may lie.
- All marks on the mark grid should be used appropriately.
- All the marks on the mark grid are designed to be awarded. Examiners should always award full marks if deserved. Examiners should also be prepared to award zero marks, if the learner's response is not rewardable according to the mark grid.
- Where judgement is required, a mark grid will provide the principles by which marks will be awarded.
- When examiners are in doubt regarding the application of the mark grid to a learner's response, a senior examiner should be consulted.

Specific marking guidance

The mark grids have been designed to assess learners' work holistically. Rows in the grids identify the assessment focus/outcome being targeted. When using a mark grid, the 'best fit' approach should be used.

- Examiners should first make a holistic judgement on which band most closely matches the learner's response and place it within that band. Learners will be placed in the band that best describes their answer.
- The mark awarded within the band will be decided based on the quality of the answer in response to the assessment focus/outcome and will be modified according to how securely all bullet points are displayed at that band.
- Marks will be awarded towards the top or bottom of that band depending on how they have evidenced each of the descriptor bullet points.

Mark Grid for Unit 1: Dispute Solving in Civil Law (20168K)

Max mark for unit 20168K: 60 (30 marks per activity)

To be used with both Activity 1 and Activity 2						
Assessment focus	**Band 0**	**Band 1**	**Band 2**	**Band 3**	**Band 4**	**Band 5**
	0	**1–2**	**3–4**	**5–6**	**7–8**	**9–10**
Selection, knowledge and understanding of relevant legal rules and principles. **Citation of appropriate statutes, precedent and other legal authorities.**	No rewardable material.	●Selection of very limited or anecdotal legal principles. ●Very limited detail and/or development of the relevant law ●Very limited or no use of precedents, statutes or other legal authorities.	●Selection of a limited range of basic legal principles. ●Limited detail and/or development of the relevant law. ●Limited use of precedents, statutes or other legal authorities.	●Selection of an adequate range of legal principles. ●Some detail and some development of the relevant law. ●Adequate use of precedents, statutes or other legal authorities.	●Selection of a wide range of legal principles. ●Good detail and development of the relevant law. ●Good use of precedents, statutes or other legal authorities.	●Selection of a comprehensive range of legal principles. ●Thorough detail and development of the relevant law. ●Very good use of precedents, statutes or other legal authorities.

Mark Grid for Unit 1: Dispute Solving in Civil Law (20168K)

Max mark for unit 20168K: 60 (30 marks per activity)

To be used with both Activity 1 and Activity 2						
Assessment focus	**Band 0**	**Band 1**	**Band 2**	**Band 3**	**Band 4**	**Band 5**
Application of legal principles to the facts provided. **Analysis of legal arguments relevant to the given scenario.** **Evaluation of legal principles and arguments to provide critical commentary and reach justified conclusions.**	**0**	**1–4**	**5–7**	**8–10**	**11–13**	**14–16**
	No rewardable material.	●Demonstrates very limited application of the law relevant to the scenario. ●Analysis lacks a grasp of the concepts and legal arguments in the context of the scenario. ●Evaluation fails to provide alternatives or conclusions or does so in a very limited or anecdotal manner.	●Demonstrates limited application of the law relevant to the scenario. ●Analysis shows limited grasp of the concepts and legal arguments in the context of the scenario. ●Evaluation shows limited consideration of alternatives and/or conclusions.	●Demonstrates adequate application of the law relevant to the scenario. ●Analysis shows some grasp of the concepts and legal arguments in the context of the scenario. ●Evaluation shows adequate consideration of alternatives and/or conclusions.	●Demonstrates a good application of the law relevant to the scenario. ●Analysis shows a good grasp of the concepts and legal arguments in the context of the scenario. ●Evaluation shows good consideration of alternatives and/or conclusions.	●Demonstrates thorough application of the law relevant to the scenario. ●Analysis shows detailed and reasoned grasp of the concepts and legal arguments in the context of the scenario. ●Evaluation shows thorough consideration of alternatives and/or justified conclusions.

Mark Grid for Unit 1: Dispute Solving in Civil Law (20168K)

Max mark for unit 20168K: 60 (30 marks per activity)

To be used with both Activity 1 and Activity 2					
Assessment focus	**Band 0**	**Band 1**	**Band 2**	**Band 3**	**Band 4**
	0	**1**	**2**	**3**	**4**
Presentation and structure	No rewardable material.	• Lacks professional format and structure, leading to lack of clarity. • Language is inappropriate for audience.	• Has a basic professional format and structure with some clarity. • Language is sometimes appropriate for audience.	• Has a logical structure and format that is generally clear and professional. • Language is mostly appropriate for audience.	• Is well written, uses clear language, has a logical and professional format and structure. • Language is appropriate for audience throughout.

Activity 1 – Indicative content

Demonstrate an understanding of the legal principles relating to negligence:

- duty of care
- breach of that duty, and
- causation of foreseeable damage.

Recognise relevant legal authorities:

Duty of care: *Robinson v Chief Constable of West Yorkshire Police*

- Where there is an existing precedent, apply it:
    - A well-recognised common law duty of care exists based on the employer-employee relationship: *Wilson & Clyde Coal Co v English, Wilson v Tyneside Window Cleaning Co*
    - Also credit any relevant statutory authority such as the s.2 *Health & Safety at Work Act 1974* (as amended)
    - Apply any existing relevant precedent such as: *Walker v Northumberland County Council, Paris v Stepney, Hatton v Sutherland, Barber v Somerset County Council* or *Daw v Intel Corporation*

Breach: The objective 'reasonable man' test: *Blyth v Birmingham Waterworks Company*

- Standard as applied to:
    - A reasonable employer: *Walker v Northumberland County Council, Paris v Stepney (no double credit), Wilson & Clyde Coal Co v English, Wilson v Tyneside Window Cleaning Co,*
- Risk factors:
    - Special characteristics and extent of harm: *Walker v Northumberland County Council, Paris v Stepney, Hatton v Sutherland, Barber v Somerset County Council* or *Daw v Intel Corporation*

Damage:

- Factual causation: *Barnett v Chelsea and Kensington Hospital Management Committee*
- Remoteness of damage: *The Wagon Mound.*

Apply the law to Tariq and Midshire Airport

Tariq is owed a duty of care by Midshire Airport

- There is a **well-established common law duty of care** between employers and employees as per *Wilson & Clyde Coal Co v English* or *Wilson v Tyneside Window Cleaning Co*, or
- There is a **statutory duty of care** to provide a safe working environment under s.2 of the *Health & Safety at Work Act (1974)* as amended, or
- The case has a strong similarity to **existing precedents** such as *Walker v Northumberland County Council* and *Paris v Stepney* (or others listed above) which would provide precedents for the existence of a duty of care

Midshire Airport is likely to have breached the duty owed

- Based on the precedent from *Walker v Northumberland County Council:*
    - Midshire Airport has fallen below the standard of the reasonable employer
    - The reasonable employer would have:
        - Responded to the original notification of an unmanageable workload
        - acted on the return-to-work plan
        - not increased Tariq's workload
        - acted on the further notification from Tariq and his union

- Varying the standard of care (*Paris v Stepney*):
    - Once Midshire Airport were aware of Tariq's mental health problems on his return to work, they had knowledge of his special characteristics or known vulnerability and the gravity of the potential harm to him, they owed him a higher standard of care
    - This means they should have taken actions to ensure he was not exposed to this greater harm such as putting the agreed plan (clear his backlog, reduce his workload, provide support and breaks) in place to reduce the stress on an employee with a known vulnerability, not increasing his workload by expecting him to cover for other staff. Also, they should have responded to the written notification from Tariq and his union
    - Where a learner asserts that Tariq should withstand 'normal' stress in a stressful job or that he is especially sensitive or vulnerable
        - Tariq does not seem 'especially vulnerable' or sensitive given other staff have also been signed off work with stress
        - Tariq also has no history of mental health problems and has a 'normal, happy home life' meaning there are no other independent contributory factors to be discounted
    - Midshire Airport also had sufficient notification of the issues affecting Tariq
    - In these circumstances, the standard of care owed by Midshire Airport should have been varied to a higher standard and this would have contributed to any consideration of a breach.

Midshire Airport has caused foreseeable harm

- Midshire Airport has **caused** personal injury to Tariq (the psychiatric harm he has suffered) which, 'but for' its omission (not implementing the return-to-work plan and providing appropriate support), he would not have sustained. Therefore, Midshire Airport is the factual cause of Tariq's psychiatric injuries
- The harm is not too remote from the stress at work created by the employer, especially given Tariq's recent medical history which meant another breakdown was a **reasonably foreseeable** consequence.

Use the source

- For example, Tariq's psychiatric wellbeing was not protected by Midshire Airport. It '*chose to continue to employ him but provided no effective help. In so doing [it was] acting unreasonably and therefore in breach of [its] duty of care'*
- Alternatively, make any relevant use of (or link to) the source.

Likely outcome for Midshire Airport

- Midshire Airport is likely to be liable to Tariq in negligence:
    - It owed him a duty of care based on either existing precedents, statute or a well-established common law doctrine
    - It breached that duty by falling below the standard of the reasonable employer based on *Walker v Northumberland County Council*
    - It caused reasonably foreseeable harm based on a straightforward application of the 'but for' and remoteness tests.

Credit any other alternative lines of reasoning

- Alternative outcomes where properly supported.

Activity 2 – Indicative content

Demonstrate understanding of the law relating to damages

- The aim of damages – to put the claimant back in the pre-negligence position
- Pecuniary loss – a loss that can easily be calculated in financial terms (loss of earnings, car repairs)
- Non-pecuniary loss – a loss that is not rooted in financial loss (pain, grief, suffering)
- Special damages – pecuniary losses calculated specifically up to the date of the settlement
- General damages – non-pecuniary losses calculated from the trial date
- Lump sums and structured settlements.

Demonstrate understanding of the law relating to access to justice and the civil justice system

Sources of advice

- Lawyers
- Citizens Advice
- Trades unions
- Free Representation Units
- Lawyers' *pro bono* schemes
- Online advice sources
- Insurance policies.

Sources of funding

- Conditional Fee Arrangements
- Claimant's own resources
- Lawyers' *pro bono* schemes
- Insurance policies.

Alternatives to the Civil Courts

- Negotiation
- Mediation
- Conciliation
- Arbitration.

The Civil Courts

- Courts of first instance:
    - The Queen's Bench Division of the High Court >£100,000 or >£50,000 for PI
    - The County Court <£100,000 or <£50,000 for PI (including Small Claims<£10,000 or £1,000 for PI).

The three-track system

- Small Claims (<£10,000 or <£1,000 PI) – informal, DIY, inquisitorial, no lawyers or legal aid
- Fast Track (£10,000 – £25,000) – fast allocation and hearing (30 weeks), one-day trial, strict court-enforced timetables
- Multi-Track (>£25,000) – encourages ADR, active case management, strict timetables, limited costs, case conferences.

Apply the law to Tariq

Damages

- Tariq can claim **special** damages (for his pecuniary losses) of:
  - Six months off work and the anticipated earnings (air traffic job: six months at £100,000 a year = £50,000 less any benefit payments [26 weeks at £100] = £47,400 + jazz musician job: six months at minimum 4 x £250 = £6,000 = £53,400)
  - Medical costs such as doctor's and other therapy fees, specialist psychiatric treatment and any associated medicines
  - Any travel expenses incurred with hospital visits and associated medical appointments.
- Tariq can claim **general** damages (for his non-pecuniary losses) for an unspecified amount to be determined by the court. This is to cover things such as:
  - Ongoing mental health problems due to the psychiatric harm
  - Loss of future earnings – these may be significant in Tariq's case. The injuries have ended a well-paid career and he may not be able to return to work as a result of his psychiatric condition. The court will have to take his age into account and try and project the impact not only on potential future earnings but loss of opportunities that may now be unavailable
  - Loss of amenity - we are told that Tariq's mental health problems mean he can no longer enjoy his music as he can no longer face an audience
  - Future medical costs – again, these may be ongoing given the nature of Tariq's psychiatric harm. For example, he may need long-term counselling and other psychological therapies.

Potential advice and funding issues

- Based on information given, Tariq appears now to be out of work and unemployed. We are unaware of any capital or savings he may have from his previous well-paid career but you should explain that (regardless of earnings/capital) there is no legal aid for PI cases
- Tariq may have some support from his union
- However, it should be noted that personal injury cases such as this are commonly funded via a Conditional Fee Arrangement (CFA), which is the most likely form of funding the case – explain to him how a CFA would work
- Explain to Tariq that there are a number of alternative means of obtaining advice for his case such as Law Centres, Free Representation Units and Citizens Advice.

Important note

Tribunals are not part of the specification and the **Part B** information rules out pursuing any action in an employment tribunal. The question is based on pursuing an action in negligence only.

Alternate Dispute Resolution versus the appropriate Civil Court for Tariq's case

The alternative use of Alternative Dispute Resolution (ADR)

- Midshire Airport will almost certainly have employer's liability insurance as this is a legal requirement. It may well also have separate commercial legal insurance to cover the full range of its activities. Therefore, it seems worthwhile for Tariq to pursue his case as the funds to pay any damages would appear to be available
- Explain the reasons why Tariq should not worry about going to court by explaining the benefits of a Civil Court adjudication
- Explain the alternative types of ADR available to Tariq and discuss their relative advantages and disadvantages compared to formal action
- Suggest that in his circumstances formal mediation might be the best alternative.

Likely court

- Given the amount of money involved in Tariq's case (the facts in **Part B** estimate this at £53.4k in lost earnings alone), as well as the complexity of calculating the various aspects of different damages for loss of a promising career and the limitations of his psychological conditions, it is clear that this case would be heard in the High Court Queen's Bench Division
- Explain to Tariq that this is a court based in London, but it does have regional centres so he will not have to worry about access and travel given his mental health problems around appearing in public
- Explain to Tariq that he will benefit from the expertise of a High Court judge given the complexity/issues in his case.

Likely track

- Explain to Tariq that based on the value of his claim (>£50,000), the complexity of the evidence and the complexity of assessing and awarding relevant damages, the case is almost certain to be allocated to the Multi-Track
- Explain that this is a thorough process controlled by the judges throughout. However, you should explain to Tariq that the judges will also try to encourage an out-of-court settlement – quite possibly by suggesting the use of a contingency fee arrangement (CFA) or Alternative Dispute Resolution (ADR)
- Explain that if an out-of-court settlement cannot be made, then the trial is likely to take six months or more to come to court with many tightly prescribed pre-trial processes (PI cases have to follow pre-action protocols) and that the trial itself will be a significant process, including use of expert medical witnesses.

Likely overall outcome

Based on the law and evidence reviewed, Tariq will succeed and receive significant damages.

- His case will be heard on the Multi-Track in the High Court
- He will not receive legal aid for a personal injury case but has a very attractive case for a CFA
- An out-of-court settlement is also quite possible but Tariq should take professional advice about whether this is appropriate/enough
- ADR could be considered but, given the likely level of damages, it is submitted that these would lack the authority of a court-based outcome and award.

Credit any other alternative lines of reasoning.

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